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State v. Jimison Appellant's Brief Dckt. 44815

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 44815
Plaintiff-Respondent,)	
)	ADA COUNTY NO. CR-FE-2015-12604
v.)	
)	
RICARDO ALLEN JIMISON,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
<hr/>)	

STATEMENT OF THE CASE

Nature of the Case

Following a trial, the jury found Ricardo Allen Jimison guilty of felony grand theft and forgery. The district court accepted Mr. Jimison's admission to being a persistent violator. The district court imposed concurrent unified sentences of eight years, with two years fixed. On appeal, Mr. Jimison asserts the district court abused its discretion when it imposed his sentences.

Statement of the Facts & Course of Proceedings

Ada County Sheriff's Office deputies responded to a reported check forgery at a trucking company in Kuna. (*See* Presentence Report (*hereinafter*, PSI), p.3.)¹ An employee told the deputies she had been balancing the company's business checking account and noticed a check had been cashed out of sequence. (*See* PSI, p.3.) The owners of the company suspected Mr. Jimison was the employee who stole and cashed the check. (*See* PSI, p.3.)

The day after, one of the owners of the company spoke with Mr. Jimison about the cashed check. (*See* PSI, p.3.) Mr. Jimison admitted to the owner that he took the check and cashed it due to his girlfriend's troubles. (*See* PSI, p.3.) The owner had audio recorded the meeting, and turned over the recording to law enforcement. (*See* PSI, p.3.) The following day, Ada County deputies contacted Mr. Jimison over the phone. (PSI, p.3.) Mr. Jimison admitted to taking the check from the owner and cashing the check, in the amount of \$780.00, after forging the owner's signature. (*See* PSI, p.3.)

The State charged Mr. Jimison by Information with one count of grand theft, felony, I.C. §§ 18-2403(1), 18-2407(1)(b), and 18-2409, and one count of forgery, felony, I.C. § 18-3601. (R., pp.50-51.) He entered a not guilty plea. (R., p.53.) The State later filed an Information Part II, alleging Mr. Jimison should be considered a persistent violator under I.C. § 19-2514. (R., pp.65-66.)

The case proceeded to a jury trial. (R., pp.89-92, 99-101.) The jury found Mr. Jimison guilty of grand theft and forgery. (R., p.126.) Mr. Jimison then admitted to the allegations in the Information Part II, and the district court accepted his admissions. (*See* Tr. Nov. 30, 2016, p.292, L.11 – p.296, L.20.)

At the sentencing hearing, the State recommended the district court impose a unified sentence of ten years, with three years fixed. (Tr. Jan. 27, 2017, p.8, Ls.8-13, p.17, Ls.16-21.) Mr. Jimison recommended the district court place him on probation, or in the alternative retain jurisdiction, with an underlying unified term of four years, with one year fixed. (Tr. Jan. 27, 2017, p.22, L.22 – p.23, L.4.) The district court, on each count, imposed a unified sentence of eight years, with two years fixed, to be served concurrently with the other count. (R., pp.138-42.)

Mr. Jimison filed a Notice of Appeal timely from the district court’s Judgment of Conviction and Commitment.² (R., pp.135-37; *see* R., pp.154-59 (Amended Notice of Appeal).)

ISSUE

Did the district court abuse its discretion when it imposed concurrent unified sentences of eight years, with two years fixed, upon Mr. Jimison following his convictions for grand theft and forgery?

¹ All citations to the PSI refer to the 153-page PDF copy of the Presentence Report and attachments.

² Mr. Jimison later filed a Motion for Reconsideration of Sentence under Idaho Criminal Rule 35 (Rule 35). (R., p.160.) The district court entered an Order Denying Motion to Reduce Sentence Pursuant to Idaho Criminal Rule 35. (R., pp.162-64.) On appeal, Mr. Jimison does not challenge the district court’s denial of his Rule 35 motion. The Idaho Supreme Court has held that “[w]hen presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion.” *State v. Huffman*, 144 Idaho 201, 203 (2007). “An appeal from the denial of a Rule 35 motion cannot be used as a vehicle to review the underlying sentence absent the presentation of new information.” *Id.*

ARGUMENT

The District Court Abused Its Discretion When It Imposed Concurrent Unified Sentences Of Eight Years, With Two Years Fixed, Upon Mr. Jimison Following His Convictions For Grand Theft And Forgery

Mr. Jimison asserts the district court abused its discretion when it imposed his concurrent unified sentences of eight years, with two years fixed, because his sentences are excessive considering any view of the facts. The district court should have instead followed Mr. Jimison's recommendation by placing him on probation, or in the alternative by retaining jurisdiction, with underlying unified sentences of four years, with one year fixed.

Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving "due regard to the nature of the offense, the character of the offender, and the protection of the public interest." *State v. Strand*, 137 Idaho 457, 460 (2002).

The Idaho Supreme Court has held that, "[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence." *State v. Jackson*, 130 Idaho 293, 294 (1997) (internal quotation marks omitted). Mr. Jimison does not assert that his sentences exceed the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Jimison must show that in light of the governing criteria, the sentences were excessive considering any view of the facts. *Id.* The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.* An appellate court, "[w]hen reviewing the length of a sentence . . . consider[s] the defendant's entire sentence." *State v. Oliver*, 144 Idaho 722, 726

(2007). The reviewing court will “presume that the fixed portion of the sentence will be the defendant’s probable term of confinement.” *Id.*

Mr. Jimison asserts his sentences are excessive considering any view of the facts, because the district court did not adequately consider mitigating factors. Specifically, the district court did not adequately consider Mr. Jimison’s mental health issues. While Mr. Jimison did not complete a presentence questionnaire or participate in the presentence interview process (*see* PSI, p.10), at the sentencing hearing Mr. Jimison’s counsel told the district court, “in the year 2000, he fell off a roof, fell 15 feet and had a traumatic head injury. It is detailed in that 2008 PSI. It talks about some of his decision making abilities and how that can be impaired.” (Tr. Jan. 27, 2017, p.20, Ls.6-11.)

Mr. Jimison’s 2008 PSI, from a previous case, described how Mr. Jimison had a brain injury caused by a fifteen-foot fall from a ladder. (*See* PSI, p.135.) In 2007, Mr. Jimison had declined outpatient brain injury rehabilitating services, offered by Dr. Clay Ward, Ph.D. (PSI, p.135.) However, Mr. Jimison had previously been diagnosed by Dr. Ward around 2000 with “cognitive disorder NOS, moderate to severe, significant signs of frontal lobe dysfunction with significantly impaired judgment secondary to TBI.” (*See* PSI, p.135.) Another evaluator, Richard Smith, Ph.D., had “found a significant problem with memory function, low intellectual scores, and . . . broad spectrum cognitive losses due to the traumatic brain injury.” (*See* PSI, p.135.) Dr. Smith stated Mr. Jimison “is likely severely impaired in personal, social and occupational function and did not feel he could manage his own funds.” (PSI, p.135.)

During the sentencing hearing, Mr. Jimison admitted, “I have a bad history, I see now, of going against medical advice right from the git-go.” (Tr. Jan. 27, 2017, p.25, Ls.13-15.0 Mr. Jimison also informed the district court, “I know I still have some judgment issues.”

(Tr. Jan. 27, 2017, p.26, Ls.8-9.) He indicated that his girlfriend had taken advantage of him, because she had helped him refile for disability and “kind of knew where I was at.” (*See* Tr. Jan. 27, 2017, p.26, Ls.17-24.) Further, Mr. Jimison stated, “I’m asking for probation because I know Dr. Ward would be glad to work with me and help me, to get to the issue on my judgment issues and my stress levels, you know, keep it down because I get really stressed out now.” (Tr. Jan. 27, 2017, p.27, Ls.16-20.) He wanted to get some counseling from Dr. Ward “on this, how to learn to work around that. Because I realize now I spent the last 16 years dodging that issue, and I can’t do that no more.” (Tr. Jan. 27, 2017, p.30, Ls.7-14.)

The district court also did not give adequate consideration to Mr. Jimison’s remorse and acceptance of responsibility. At the sentencing hearing, Mr. Jimison explained he had thought the lives of his girlfriend and her son were in danger, and that she needed the money. (*See* Tr. Jan. 27, 2017, p.24, Ls.3-23.) He stated, “I would do it again if somebody’s life was in danger.” (Tr. Jan. 27, 2017, p.28, Ls.24-25.) However, Mr. Jimison also told the district court, “I am not only sad, but I’m sorrowful, too, because I may have caused [the owner] and his family, anybody else that’s familiar with this case, reason to doubt other people. You know, and I feel bad about that, especially [the owner], because, you know what I mean, they opened their door to me all the way.” (Tr. Jan. 27, 2017, p.23, L.20 – p.24, L.1.) He stated he felt bad because the owners had trusted him, “[a]nd I didn’t know what to do. I didn’t know what to do because, you know, I loved [the girlfriend] foolishly. And, you know, her life was in danger, you know, and it was like it wasn’t a good thing. And I could see now that she took advantage of me.” (*See* Tr. Jan. 27, 2017, p.24, L.24 – p.25, L.9.) Mr. Jimison told the district court he wanted to offer an apology to the owners of the trucking company. (*See* Tr. Jan. 27, 2017, p.29, Ls.2-6.)

Additionally, the district court did not adequately consider Mr. Jimison's recent criminal history. Although Mr. Jimison has an extensive criminal record (*see* PSI, pp.3-6), the last disposition date he had before the instant offenses was in 2009 (*see* PSI, pp.5-6; Tr. Jan. 27, 2017, p.21, Ls.2-4).³ His counsel reported, "Mr. Jimison tells me that at that time, he turned to religion. I believe he was baptized and swore to himself that he would never commit another crime. And if you look at his criminal history, he doesn't have any crimes after that date." (Tr. Jan. 27, 2017, p.21, Ls.5-10.) Mr. Jimison told the district court, "I was baptized in 2008 by a bunch of cowboys in Wells, Nevada, at the LDS church. And I pretty much thought I was on a good path." (Tr. Jan. 27, 2017, p.27, Ls.2-5.)

More recently, while Mr. Jimison was in jail for the instant offenses, "he did alert the staff to a fellow inmate who had a shank." (Tr. Jan. 27, 2017, p.29, Ls.8-12.) According to his counsel, Mr. Jimison "did alert the authorities there at the jail. And, in fact, they did find a weapon of some type on another party." (Tr. Jan. 27, 2017, p.29, Ls.15-16.)

Because the district court did not adequately consider the above mitigating factors, the sentences imposed by the district court are excessive considering any view of the facts. Thus, Mr. Jimison asserts the district court abused its discretion when it imposed his sentences.

³ The PSI stated that Mr. Jimison was placed on a retained jurisdiction "rider" in 2009, the district court relinquished jurisdiction and executed his sentence later in 2009, and he was subsequently released and discharged from parole in 2013. (*See* PSI, p.6.)

CONCLUSION

For the above reasons, Mr. Jimison respectfully requests that this Court reduce his sentences as it deems appropriate.

DATED this 30th day of August, 2017.

_____/s/_____
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 30th day of August, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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MELISSA MOODY
DISTRICT COURT JUDGE
E-MAILED BRIEF

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ADA COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

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DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

BPM/eas